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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

**JIM EDGAR, Secretary of State,
STATE OF ILLINOIS,**

Petitioner,

v.

McVEY TRUCKING, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

(1) Whether the decision below expands congressional authority to abrogate the sovereign immunity of a nonconsenting state beyond the parameters previously established by this Court in holding that Congress, acting pursuant to its power to enact laws governing bankruptcy, Art. I §8, cl. 4, may create a cause of action for money damages enforceable against a nonconsenting state in federal court?

(2) Whether the Court of Appeals, relaxing this Court's demand in *Atascadero v. Scanlon* that Congress express its intention in unmistakable language in the statute itself when abrogating State sovereign immunity, erred in holding that Congress properly created a cause of action against a nonconsenting state enforceable in federal court when it enacted §§547(b), 106 and 101(21) of the Bankruptcy Code?

LIST OF PARTIES

The parties to this proceeding are the petitioner, JIM EDGAR, Secretary of State, State of Illinois, and the respondent, MCVEY TRUCKING, INC., an Illinois corporation.

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In The

Supreme Court of the United States

October Term, 1986

JIM EDGAR, Secretary of State,
STATE OF ILLINOIS,

Petitioner,

v.

McVEY TRUCKING, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner Jim Edgar, Secretary of State, State of Illinois, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in the above-captioned proceeding on February 13, 1987.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 812 F.2d 311 (7th Cir. 1987), and is reprinted in the Appendix hereto at p. 1.

The opinion of the United States District Court for the Central District of Illinois affirming the order of the United States Bankruptcy Court is unreported. It is reprinted in the Appendix hereto at p. 35.

The order of the United States Bankruptcy Court granting petitioner's Motion to Dismiss is unreported. It is reprinted in the Appendix at p. 40.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit which Petitioner requests this Court to review was entered on February 13, 1987. This Petition for a Writ of Certiorari is filed within 90 days of the entry of that order. The jurisdiction of this Court is invoked pursuant to 28 U.S.C., Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Eleventh Amendment to the United States Constitution provides as follows:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or subjects of any foreign State.

11 U.S.C. §106 provides: Waiver of sovereign immunity

(a) A governmental unit is deemed to have waived sovereign immunity with respect to any claim against

such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which such governmental unit that is property of the estate.

(b) There shall be offset against an allowed claim or interest of a governmental unit any claim against such governmental unit that is property of the state.

(c) Except as provided in subsections (a) and (b) of this section and notwithstanding any assertion of sovereign immunity—

(1) a provision of this title that contains "creditor", "entity", or "governmental unit" applies to governmental units; and

(2) a determination by the court of an issue arising under such a provision binds governmental units.

11 U.S.C. §547(b) provides:

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of property of the debtor—

(1) to or for the benefit of a creditor

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was solvent;

(4) made

(A) on or within 90 days before the date of the filing of the petition; or

(5) that enables such creditor to receive more than such creditor would receive if:

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

STATEMENT UNDER RULE 28.4(b)

Since the proceeding draws into question Sections 106 and 547(b) of the Bankruptcy Code, 11 U.S.C. §§106, 547(b) (1982 & 1985 Supp.), an Act of Congress affecting the public interest, and neither the United States nor any agency, officer, or employee thereof is a party, it is noted that 28 U.S.C. §2403(a) may be applicable.

STATEMENT OF THE CASE

Respondent, McVey Trucking, Inc., was foreclosed in involuntary bankruptcy on May 16, 1984, more than two months after placing certificates of deposit, payable to the Petitioner Secretary of State of Illinois (hereinafter the "Secretary"), with a local bank to cover payment of prospective highway use taxes.

After the initiation of McVey's bankruptcy proceedings, the bank, upon the Secretary of State's request, paid the funds to the State. Thereafter, McVey filed suit against the Secretary in United States Bankruptcy Court, pursuant to §547(b) of the Bankruptcy Code (11 U.S.C. §547(b) (1982 and 1985 Supp.)), seeking to avoid the transfer. The Secretary of State did not file a counterclaim.

On April 29, 1985, the Bankruptcy Court dismissed the suit against the Secretary holding that the State of Illinois had not consented to suit and therefore the action was barred by the Eleventh Amendment to the United States Constitution. (App. p. 40).

On January 10, 1986, the United States District Court affirmed, holding that §106(c) and §547 of the Bankruptcy Code (11 U.S.C. §§106(c) and 547) failed to meet this Court's demand in *Atascadero State Hospital v. Scanlon*, 105 S.Ct. 3142 (1985), requiring Congress to make its intention unmistakably clear in the language of the statute "when exercising power to override the Eleventh Amendment." (App. p. 38).

On February 13, 1987, the Court of Appeals for the Seventh Circuit reversed the decision of the District Court. The Court ruled that Congress is empowered to create a cause of action for money damages against a State enforceable in federal court under "any of its plenary powers," including Art. 1, §8, cl. 4 (bankruptcy). (App. p. 22) Further, acknowledging that the test used to determine whether Congress has created such a cause of action remains unclear, the Court found that the words of §106(c) and §547(b), as well as the legislative history, are "sufficient to show congressional intent to create a cause of action against a State."[1] (App. pp. 24, 27-30).

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[1] The Court, citing *Green v. Mansour*, 106 S.Ct. 423 (1985), noted that this Court "may have retreated" from the *Atascadero* demand that Congress must 'express its intention . . . in the statute itself.' (App. p. 24).

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW EXPANDS CONGRESSIONAL AUTHORITY TO ABROGATE THE SOVEREIGN IMMUNITY OF A NONCONSENTING STATE BEYOND THE PARAMETERS PREVIOUSLY ESTABLISHED BY THIS COURT IN HOLDING THAT CONGRESS, ACTING PURSUANT TO ITS POWER TO ENACT LAWS GOVERNING BANKRUPTCY, ART. I, §8, Cl. 4, MAY CREATE A CAUSE OF ACTION FOR MONEY DAMAGES ENFORCEABLE AGAINST A NONCONSENTING STATE IN FEDERAL COURT.

The Seventh Circuit Court of Appeals, in a sweeping opinion which the court openly concedes "may appear to be at odds" with the expansive language that this Court has often employed in discussing the Eleventh Amendment and sovereign immunity, held that Congress is empowered under "any of its plenary powers" to abrogate state sovereign immunity and to create a private cause of action for money damages enforceable against a nonconsenting state in federal court. (App. pp. 22, 30). This question has never been directly addressed by this Court despite substantial constitutional implications. Indeed, this Court recently left open the question of whether Congress is empowered to create a cause of action enforceable in federal court against a nonconsenting state when it acts under its Article I powers. *See Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 252 (1985).

Previously, this Court limited Congress' power to abrogate state sovereign immunity to legislation enacted under Section 5 of the Fourteenth Amendment because the States, in adopting the Fourteenth Amendment, enlarged the powers of Congress and waived their immunity from suit

under laws found necessary by Congress to enforce the substantive guarantees of section 1 of that amendment. Because the Bankruptcy Code was not enacted pursuant to §5 of the Fourteenth Amendment, the Seventh Circuit's holding creates a shift in the allocation of power between the federal and state governments, discounting the historical and policy considerations underlying the adoption of the Eleventh Amendment—the preservation of federalism.

It has long been acknowledged that "behind the words of the constitutional provisions are postulates which limit and control." *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322, 78 L. Ed. 2d 1282 (1934). The Eleventh Amendment represents one such explicit limitation on the exercise of judicial power against a state.

Indeed, a long line of cases has established that an unconsenting state may not be sued in federal court, either because of the Eleventh Amendment, see e.g. *Papasan v. Allain*, 106 S.Ct. 2932 (1986); *Atascadero State Hospital v. Scanlon*, 105 S.Ct. 3142 (1985); *Edelman v. Jordan*, 415 U.S. 651 (1974); *Pennhurst State School & Hospital v. Halderman*, 456 U.S. 89 (1984), or because of principles of sovereign immunity inherent in the structure of the Constitution. *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L. Ed. 842 (1890); *Pennhurst, supra.* However, in *Fitzpatrick v. Bitzer*, 427 U.S. 445, 49 L. Ed. 2d 614 (1976), which involved a suit under Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000 *et seq.*), this Court first recognized congressional power to abrogate state sovereign immunity when Congress exercises power granted by §5 of the Fourteenth Amendment. *Fitzpatrick* suggests, however, that the Eleventh Amendment should be viewed as a restriction on both the judicial power to entertain, and the congressional authority to create private damage

actions in the federal courts. (See also: Comment, *Implied Waiver of a State's Eleventh Amendment Immunity*, 1974 Duke L.J. 925). The holding in *Fitzpatrick* was simply that immunity granted by the Eleventh Amendment was "necessarily limited by the enforcement provisions of §5 of the Fourteenth Amendment" (427 U.S. at 456). Because the Fourteenth Amendment was adopted with the avowed purpose of limiting state autonomy, principles of federalism do not limit congressional authority to invade state autonomy as severely when Congress legislates under §5 as when its enactment is based upon some other power. The decision in *Fitzpatrick* is, thus, a necessary compromise between two competing constitutional provisions. Far from indicating that express congressional authorization would be sufficient to effect a "forced waiver," this Court carefully limited the effect of its decision to suits arising under the Fourteenth Amendment:

> * * * We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against states or state officials *which are constitutionally impermissible in other contexts.* (citations omitted and emphasis supplied) (427 U.S. at 456).

More recently, in *Atascadero State Hospital v. Scanlon*, 105 S.Ct. 3142 (1985), this Court reaffirmed that because the Eleventh Amendment is " 'necessarily limited by the enforcement provisions of §5 of the Fourteenth Amendment,' that is, by Congress' power 'to enforce, by appropriate legislation, the substantive provisions of the Fourteenth Amendment' . . . Congress can abrogate the Eleventh Amendment without the States' consent." (105 S.Ct. at 3145). Thus, even by this Court's most recent decisions, there is no support for the conclusion reached by the Seventh Circuit that Congress is empowered to abrogate state immunity under "any of its plenary powers."

The holding of the Seventh Circuit that Congress may create a cause of action against a nonconsenting state enforceable in federal court under "any of its plenary powers" poses grave implications for the principles of federalism and dual sovereignty embodied in the Eleventh Amendment's prohibition against suing states in federal court. In expanding the role of Congress and the federal courts in their relationship with nonconsenting states, especially in the area of bankruptcy, the Seventh Circuit has created a constitutional question potentially affecting every state in the Union. It is a question which this Court should resolve.

II.

THE COURT OF APPEALS, RELAXING THIS COURT'S DEMAND IN *ATASCADERO v. SCANLON* THAT CONGRESS EXPRESS ITS INTENTION IN UNMISTAKABLE LANGUAGE IN THE STATUTE ITSELF WHEN ABROGATING STATE SOVEREIGN IMMUNITY, ERRED IN HOLDING THAT CONGRESS PROPERLY CREATED A CAUSE OF ACTION AGAINST A NONCONSENTING STATE ENFORCEABLE IN FEDERAL COURT WHEN IT ENACTED §§547(b), 106 AND 101(21) OF THE BANKRUPTCY CODE.

In *Atascadero State Hospital v. Scanlon*, *supra*, this Court unequivocally required that Congress, when exercising its power to abrogate the States' constitutionally secured immunity from suit in federal court, must express its intention "in unmistakable language in the statute itself." (105 S.Ct. at 3144). The opinion of the Seventh Circuit Court of Appeals, noting that this Court "may have retreated" from the *Atascadero* demand, held that under §106(c) of the Bankruptcy Code, Congress properly abrogated state sovereign immunity, thus making the State amenable to §547(b) of the Bankruptcy Code, which pro-

vides that a debtor in possession may bring suit in federal court to "avoid any transfer of an interest in property . . . to or for the benefit of a *creditor*." (11 U.S.C. §547(b) (1982 & 1985 Supp.)) (emphasis supplied).

Thus, despite the fact that §547(b) itself makes no reference to the states or to state sovereign immunity, the Court held that it was enforceable against the State. Indeed, §547(b) simply contains the term "creditor," which, without reference to §106(c), applies to "governmental units" under §106(c) for purposes of abrogating state sovereign immunity. Further, in yet a completely separate section of the Bankruptcy Code, "governmental unit" is defined to include a "State." (11 U.S.C. §101(21) (1982)). This maze of disjointed statutory language is hardly the clear, unmistakable expression of congressional intent required to be contained "in the statute itself" under *Atascadero*. Indeed, it is difficult to reconcile the Court of Appeals' opinion here with this Court's holding in *Employees of the Department of Public Health and Welfare v. Missouri*, 411 U.S. 279 (1973). In *Employees*, state hospital employees claimed that they were owed overtime compensation under Section 16(b) of the Fair Labor Standards Act of 1938. In 1966, Section 3(d) of the Act was amended to include a State as an "employer" to the extent it employed persons in specified types of hospitals, institutions, or schools. Section 16(b), granting a right of action for minimum wages or overtime against "any employer who violates the provisions of the Act," was not amended. In the absence of "clear language that the State's constitutional immunity was swept away under 16(b)," this Court refused to infer that Congress had abrogated state immunity by means of its amendments to other sections of the Act.

Further, the very words of §106 here fail to utilize the clear, unmistakable, unequivocal language sufficient to meet the *Atascadero* demand. The Court of Appeals' interpretation of §106(c) to create a cause of action against a state in provisions using the term "creditor," renders §106(a) and §106(b) superfluous. If §106(c) makes states generally amenable to suit, Congress would have no reason to provide that states are amenable under the more limited circumstances of §106(a) and §106(b). Indeed, the district court in this case is not the only court that has been confused over the vague and equivocal language of §106. See *Cohen v. Illinois Dept. of Public Aid, (In re Ramos),* 12 B.R. 250 (Bkrtcy. N.E. Ill. 1981) and *In re Regal Construction Co., Inc.*, 18 B.R. 353 (1982).

Finally, the Seventh Circuit's opinion attempts to relax the stringent demand of this Court in *Atascadero* by holding that courts may consult the legislative history of the statute in determining congressional intent to create a cause of action for money damages against a state in federal court. (App. pp. 23-25). In *Atascadero*, this Court expressly rejected the respondent's argument that the pre- and post-enactment legislative history of the Rehabilitation Act (29 U.S.C. §504) was relevant. Rather, this Court demanded that Congress express its intention unmistakably and "in the statute itself." (105 S.Ct. 3144).

Given the tangled, vague, and equivocal language of §§547, 106 and 101(21) of the Bankruptcy Code, it was erroneous for the Seventh Circuit to hold, in view of the *Atascadero* demand, that Congress intended to subject a state as a "creditor" to a cause of action in federal court under §547.

CONCLUSION

For the foregoing reasons, it is respectfully requested that a writ of certiorari issue to review the decision of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 86-1216

IN THE MATTER OF:

MCVEY TRUCKING, INC.,

Debtor-Appellant.

MCVEY TRUCKING, INC.,

Plaintiff-Appellant,

v.

SECRETARY OF STATE OF ILLINOIS, FIRST NATIONAL BANK OF DANVILLE and FIRST MIDWEST BANK OF DANVILLE,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of Illinois, Danville Division.
No. 85 C 2391—**Harold A. Baker**, *Judge.*

ARGUED SEPTEMBER 12, 1986—DECIDED FEBRUARY 13, 1987

Before POSNER and FLAUM, *Circuit Judges*, and CAMPBELL, *Senior District Judge.**

FLAUM, *Circuit Judge.* McVey Trucking, a debtor, brought this action under § 547(b) of the Bankruptcy Code

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* The Honorable William J. Campbell, Senior District Judge for the Northern District of Illinois, Eastern Division, is sitting by designation.

to recover money that it claims was improperly transferred to the Secretary of State of Illinois. The bankruptcy court dismissed the action, holding that under the Eleventh Amendment it lacked jurisdiction over the Secretary. The district court affirmed. Because Congress, in the exercise of its plenary power to enact bankruptcy legislation, may create a cause of action for money damages enforceable against a state in federal court, and because we are certain that, in enacting § 547(b) of the Bankruptcy Code, Congress intended to subject states to suit, we reverse and remand.

I

On February 27, 1984, McVey Trucking placed a certificate of deposit, payable to the Secretary of State of Illinois, on deposit with the First National Bank of Danville. The certificate, in the amount of $20,188.25, reflected the balance that McVey then owed to the State of Illinois for its prospective highway use tax for 1984 and 1985.[1] McVey placed a similar certificate, for $2,490.00, with the First Midwest Bank of Danville. McVey intended for the second certificate to cover its future liability to the state for its flat-weight tax. One month later, the First National Bank, which was also McVey's creditor, forced McVey to cease operation. McVey was placed in involuntary bankruptcy, under Chapter 11 of the Code, on May 16, 1984.

Three weeks after the initiation of the bankruptcy proceedings, on July 9, 1984, the Secretary of State requested the First National Bank of Danville to pay over to the state the $20,188.25 in McVey's certificate. The Secretary claimed that McVey, even though in bankruptcy, still owed this money for the state's highway use tax. Without requesting permission from the bankruptcy court, the bank made the payment. McVey thereupon filed suit against the

[1] Under state law, the entire tax apparently was due in advance. McVey, however, made a 50 per cent "down payment" to the state.

Secretary and the bank, pursuant to § 547(b) of the Bankruptcy Code, 11 U.S.C. § 547(b) (1982 & 1985 Supp.), seeking to avoid the transfer.

The Secretary of State moved to dismiss McVey's suit, arguing that because he was a state official, the Eleventh Amendment to the United States Constitution denied the bankruptcy court personal jurisdiction over him unless the state consented to be sued. The bankruptcy court, concluding that the State of Illinois had not consented to suit, granted the motion on April 29, 1985.

Immediately after the bankruptcy court entered its order, the Secretary of State requested the First Midwest Bank of Danville, in which McVey had deposited $2,490.00, to transfer the deposited funds to the state. The bank complied. McVey responded by amending its complaint, joining First Midwest as a defendant, and moving for reconsideration. The bankruptcy court denied the motion to reconsider. McVey appealed, arguing that in enacting § 547(b) of the Bankruptcy Code, Congress created a cause of action enforceable against a state in federal court. The district court rejected this contention and affirmed the bankruptcy court's dismissal. McVey then brought this appeal.

II

The Secretary of State is the named defendant in this case. Nonetheless, it is obvious that this is, in reality, a suit against the State of Illinois. *See Edelman v. Jordan*, 415 U.S. 651, 663 (1974) (A suit "seeking to impose a liability which must be paid from public funds in the state treasury" is a suit against the state.). Congress may create a cause of action for money damages enforceable against an unconsenting state in a federal court only if the Constitution grants Congress the power "to subject a State to suit in [the given] circumstances," *Parden v. Terminal Railway*, 377 U.S. 184, 187 (1964). In deciding this case, therefore, we must determine whether the constitutional grant of power to Congress "[t]o establish . . . uniform Laws on the subject of Bankruptcies," U.S.

Const. Art. I § 8, Cl. 4, gives Congress the power to create a cause of action for money damages against a state. We must also determine whether Article III gives the federal courts the power to issue an enforceable order against a state in such a suit.

A.

The Supreme Court has made clear that when Congress acts pursuant to its power under § 5 of the Fourteenth Amendment,[2] it may create a cause of action for money damages enforceable against an unconsenting state in the federal courts.[3] In *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), the Court held that Congress, acting under the Fourteenth Amendment, could create a cause of action for money damages against a state that had engaged in employment discrimination in violation of Title VII of the Civil Rights Act. However, the Court has left open the question of whether Congress may create a cause of action for money damages enforceable against an unconsenting state in federal court when it acts under its Article

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[2] This section gives Congress the "power to enforce . . . by appropriate legislation" the substantive provisions of the Fourteenth Amendment.

[3] The ability of Congress to create a cause of action for money damages enforceable against an unconsenting state in federal court is sometimes phrased as a question of whether Congress may abrogate state sovereign immunity (sometimes less precisely called "Eleventh Amendment" immunity) to suit. These are, in actuality, two ways of stating the same question. However, the former terminology makes clear that there are two distinct issues involved: Congress' Article I power to impose the burden of potential liability for money damages on the states, and the federal courts' Article III power to adjudicate such suits. This formulation also puts the focus where it belongs—on the extent of the delegated powers of the federal government. This focus recognizes that "we have no license to employ freestanding conceptions of state sovereignty in measuring congressional authority," *Garcia v. San Antonio Transit Authority*, 469 U.S. 528, 550 (1984), or federal judicial power.

I powers. *See Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 252 (1985).

This court has previously held that Congress' power to create a cause of action for money damages enforceable against an unconsenting state in federal court is not limited to legislation enacted pursuant to § 5 of the Fourteenth Amendment. *See Jennings v. Illinois Office of Education*, 589 F.2d 935 (7th Cir.), *cert. denied*, 441 U.S. 967 (1979). In *Jennings* we held that Congress, acting under the War Powers Clauses, U.S. Const. Art. 1 § 8, Cl. 11-13, could create a cause of action against a state by veterans seeking reemployment rights granted by Congress. In reaching this result, we concluded that "to the extent Congress acts within sovereign powers delegated to it by the states . . . it has the power to abrogate states' immunity." *Id.* at 941-42. At least three circuits have adopted this approach. *See County of Monroe v. Florida*, 678 F.2d 1124, 1128-35 (2nd Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983) (Congress may create a cause of action against a state under its extradition powers.); *Peel v. Florida*, 600 F.2d 1070, 1074-82 (5th Cir. 1979) (cause of action created under the War Powers Clauses permitted); *Mills Music v. Arizona*, 591 F.2d 1278, 1285 (9th Cir. 1979) (cause of action created under the Copyright and Patent Clause permitted).

Despite the acceptance of our approach in *Jennings*, two recent Supreme Court cases may have called its holding into question. These decisions expressly link the power of Congress to create a cause of action for money damages enforceable against an unconsenting state in federal court with Congress' exercise of its power under the Fourteenth Amendment. *See Atascadero State Hospital v. Scanlon*, 105 S.Ct. 3142, 3145, 3146, 3148 (1985) ("[W]hen acting pursuant to § 5 of the Fourteenth Amendment, Congress can" create a cause of action against a state); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 99 (1984) ("Congress has the power with respect to rights protected by the Fourteenth Amendment to" create a cause of action against a state.). The Court's language may

reflect the fact that, to date, it has only considered Congress' ability to create a cause of action for money damages enforceable against an unconsenting state in federal court in cases in which Congress has acted under its Fourteenth Amendment power. However, it is also possible that the Court may be indicating that the Fourteenth Amendment is the only grant of power that allows Congress to do so.

A recent case decided by this court suggests, albeit in a *dictum*, that we may have abandoned the approach taken in *Jennings*. In *Gary A. v. New Trier High School District 203*, 796 F.2d 940 (1986) (per curiam), we suggested that "[a] state may be sued on a federal court *only* if it consents . . . or if Congress, using powers granted by section 5 of the Fourteenth Amendment, abrogates the state's immunity." *Id.* at 943 (citations omitted) (emphasis added). In light of the language used by the Supreme Court and by this circuit, we feel compelled to revisit our decision in *Jennings*.

B.

Article I and the Fourteenth Amendment are both plenary grants of power to Congress. At first glance, therefore, it would appear that because Congress may create a cause of action for money damages enforceable against an unconsenting state in federal court under the Fourteenth Amendment, it should also be able to do so under Article I. In order to limit Congress' power to create a cause of action enforceable against an unconsenting state in federal court to actions that Congress takes in the exercise of its Fourteenth Amendment power, it is necessary to demonstrate that there is some constitutionally significant way of distinguishing Congress' Fourteenth Amendment power from its Article I powers. If there is no constitutionally significant way of distinguishing between these two grants of plenary power, then we must conclude, as we did in *Jennings*, that Congress' ability to create a cause of action for money damages enforceable against an unconsenting state in federal court is not

limited to actions that it takes using its Fourteenth Amendment power but, rather, that Congress may do so under any plenary power.

We consider two possible ways of distinguishing between Congress' Fourteenth Amendment power and its Article I powers. The first approach assumes that the force limiting Congress' power to create a cause of action for money damages enforceable against an unconsenting state in federal court is the Eleventh Amendment; the second focuses on the limitations imposed by state sovereignty.

We first consider whether Congress' Fourteenth Amendment power may be distinguished because the amendment constituted a limited "repeal" of restrictions that the Eleventh Amendment placed on congressional power or federal court jurisdiction. In this view, when Congress acts under its Fourteenth Amendment power, or the federal courts enforce a cause of action created by Congress pursuant to its Fourteenth Amendment power, they are not constrained by limitations that the Eleventh Amendment imposes in cases in which Congress acts under its Article I powers. However, because we find that the Eleventh Amendment did not limit the power of Congress or the federal question jurisdiction of the federal courts, we conclude that there was no limitation for the Fourteenth Amendment to repeal. We therefore reject this distinction.

The second possibility that we consider is that Congress' plenary power under the Fourteenth Amendment may be distinguished because Congress may displace state authority more completely when it acts under the Fourteenth Amendment than it may when it exercises its Article I powers. This view recognizes that state sovereignty—rather than the Eleventh Amendment—limits the power of Congress to create a cause of action enforceable against an unconsenting state in federal court.

We consider two ways in which Congress' Fourteenth Amendment power may be distinguished from its Article

I powers under a state sovereignty rationale. The first possibility is that Congress may create causes of action that may impose monetary burdens on the states when Congress acts under its plenary Fourteenth Amendment power, but not when it acts under the plenary Article I powers, because the Fourteenth Amendment is an "ultra-plenary" grant of power that allows Congress to impose burdens on the sovereign states that it could not impose when it acts under its Article I powers. Because we believe that the extent of Congress' power to impose its will on the states can be no greater under one plenary power than under another, we reject this distinction. The second possible distinction that we consider is that Congress may make causes of action against a state enforceable in federal court when Congress acts under its Fourteenth Amendment power, but not when it acts under its Article I powers, because the Fourteenth Amendment displaces a limit that state sovereignty imposes on federal court jurisdiction in cases in which the federal courts are enforcing causes of action created under that amendment. Because we believe that state sovereignty imposes no limitation on Article III, we conclude that there is no restriction for the Fourteenth Amendment to displace. We therefore reject this distinction.

Having rejected the two possible bases for distinguishing Congress' Fourteenth Amendment power from its Article I powers, we conclude that because Congress may create a cause of action for money damages enforceable against an unconsenting state in federal court under its Fourteenth Amendment power, it may do so under any of its plenary powers.

1. THE FOURTEENTH AMENDMENT AS A "REPEAL" OF AN ELEVENTH AMENDMENT LIMIT ON FEDERAL POWER

The first possible basis for distinguishing Congress' Fourteenth Amendment power from its Article I powers assumes that the Eleventh Amendment limited congressional power and federal jurisdiction. This approach seeks to distinguish the Fourteenth Amendment on the grounds that

it "repealed," to a limited extent, the restrictions imposed by the Eleventh Amendment. In this view, the Eleventh Amendment may have limited the Article I power of Congress to create a cause of action for money damages against a state. The Amendment may also have restricted the Article III power of the federal courts to adjudicate such suits. If the Eleventh Amendment imposed such limitations, then the Fourteenth Amendment could be distinguished by viewing it as a limited repeal of those restrictions. Such a limited "repeal" would allow Congress to create a cause of action for money damages enforceable against an unconsenting state in federal court only when it acts under its Fourteenth Amendment power.

The Supreme Court has never discussed the "repeal" analysis. However, the Court has given no indication that the chronological relation between the Eleventh Amendment and the Fourteenth Amendment is significant. Because we do not believe that the Eleventh Amendment limits either the Article I power of Congress or the Article III power of the federal courts to adjudicate cases arising under federal law, we conclude that the Eleventh Amendment imposed no limitation for the Fourteenth Amendment to repeal. We therefore reject this approach.

a. THE ELEVENTH AMENDMENT AND CONGRESSIONAL POWER. The Eleventh Amendment does not limit the Article I powers of Congress. There is no indication in the text or history of the Eleventh Amendment that its framers intended to curtail Congress' powers. Rather, the language of the Amendment makes clear that it is a limit on the power of the federal courts to interpret Article III. The amendment does not say that "Congress shall make no law. . . ." Instead, the amendment provides that "The Judicial power of the United States shall not be *construed* to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State. . . ." U.S. Const. Amend. 11 (emphasis added).

The framers of the Eleventh Amendment used the word "construe" because they wanted to limit the branch charged

with "construing" the Constitution—the judiciary. The Eleventh Amendment was enacted, not to limit congressional power, but to overrule the decision of the Supreme Court in *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). *See Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 98 (1984) ("The [Eleventh] Amendment's language overruled the particular result in *Chisolm*. . . ."); *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 276 (1959); *Ex parte New York*, 256 U.S. 490, 497-98 (1921); *Hans v. Louisiana*, 134 U.S. 1, 11 (1890). The *Chisolm* Court had "construed" the diversity provisions of Article III—which extends the judicial power of the United States "to Controversies . . . between a State and Citizens of another State"—to make states amenable to suits in *every* case in which they were sued by citizens of another state. As the language indicates, the purpose of the Eleventh Amendment was to bar a *judicial* construction like the one in *Chisolm* in the future. The Amendment simply makes clear that Article III does not itself abrogate the presumptive immunity from suit that states enjoy. *See* Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 Harv. L. Rev. 682, 693-99 (1976). However, the Amendment does not prevent Congress, acting under its Article I powers, from displacing that presumptive immunity by creating a cause of action against a state.

b. THE ELEVENTH AMENDMENT AND FEDERAL COURT JURISDICTION. The Eleventh Amendment is often conceptualized as a limitation on the Article III power of the federal courts. *See, e.g., Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 98 (1984) (The Eleventh Amendment "is a constitutional limitation on the federal judicial power established in Article III."); *Jensen v. Board of Tax Commissioners*, 763 F.2d 272, 276 (7th Cir. 1985). This formulation highlights the "special and specific position in our constitutional system," *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 556 (1985), that the states occupy. However, the Elev-

enth Amendment is not a general limitation on the judicial powers of the federal courts to adjudicate cases arising under federal law.

The Eleventh Amendment may limit the judicial power of the federal courts to adjudicate state law suits in which a state is a party. It is possible that the Eleventh Amendment was adopted to make clear that the diversity provision of Article III allowing suits "between a State and a Citizen of another State" was intended to allow a federal court to hear a state law suit only when the suit was brought *by* the state *against* citizens of other states. *See* Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction*, 35 Stan. L. Rev. 1033 (1983). However, because this case is brought under the federal question jurisdiction, we need not now decide what limitation, if any, the Eleventh Amendment places on the diversity jurisdiction.

Even if the Eleventh Amendment does limit the diversity jurisdiction, nothing on the face of the amendment suggests that it modifies the Article III federal question jurisdiction. Article III states that "The judicial Power [of the United States] shall extend to *all* Cases, in Law and Equity, arising under this Constitution [and] the Laws of the United States. . . ." U.S. Const. Art. III § 2 (emphasis added). As the Supreme Court made clear a quarter century after the enactment of the Eleventh Amendment, Article III authorizes the "judicial department . . . to decide all cases of every description, arising under the Constitution or laws of the United States. From this general grant of jurisdiction, no exception is made of those cases in which a state may be a party." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 380 (1824).

Hans v. Louisiana, 134 U.S. 7 (1890), is often cited for the proposition that the Eleventh Amendment bars a federal court from taking cognizance of a suit for money damages brought by a citizen against his or her own state even if the citizen's claim "arises under" federal law. *See*

e.g., Pennhurst, 465 U.S. at 98. However, nothing in that opinion requires such a broad reading. *Hans* was, in essence, a breach of contract suit brought by a citizen of Louisiana against his home state. Because there was no diversity of citizenship, the plaintiff sought to maintain the action in federal court by pleading his claim as a suit arising under the Contracts Clause of the Constitution, U.S. Const. Art. 1 § 10, Cl. 1. However, no statute specifically created a cause of action against a state under the Contracts Clause. Hans therefore brought his suit under the general provisions of the Judiciary Act of 1875, 18 Stat. 470, which had for the first time vested the federal courts with jurisdiction to hear suits arising under the Constitution and the laws of the United States.

The *Hans* case created a dilemma for the Supreme Court. Had Hans brought his breach of contract suit against another state under the diversity jurisdiction, the Court would certainly have held that the Eleventh Amendment barred the action. To allow Hans to bring the same action against his own state would have been anomalous. Rather than sanction this anomaly, the Court held that Hans could not bring his suit.

The *Hans* Court did not rely on the Eleventh Amendment to reach its result. It would have been difficult for the Court to argue that the Eleventh Amendment, which was ratified at a time when the federal courts had no federal question jurisdiction, was intended to restrict that jurisdiction. Instead, the Court relied on the concept of state sovereign immunity, observing that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without [the sovereign's] consent. This . . . attribute of sovereignty . . . is . . . enjoyed by the government of every state of the Union." *Hans*, 134 U.S. at 13 (*quoting The Federalist No. 81* (A. Hamilton)) (emphasis omitted).

Hans thus stands for the proposition that, as a sovereign, a state is presumptively immune from suit in a federal court even if the cause of action arises under federal law. The *Hans* Court did not consider the broader ques-

tion of whether Congress, acting pursuant to its plenary powers, could expressly displace this presumptive immunity. All that is certain from *Hans* is that the general provisions of the Judiciary Act of 1875, which did not expressly provide for federal question suits against states by individuals, did not displace this presumptive immunity.

Thus, the Eleventh Amendment did not limit any aspect of Congress' Article I powers or the Article III federal question jurisdiction. Therefore, there was no restriction for the Fourteenth Amendment to "repeal." Consequently, Congress' Fourteenth Amendment power cannot be distinguished from its Article I powers on the grounds that it is a limited repeal of restrictions imposed by the Eleventh Amendment.

2. The Fourteenth Amendment As An "Ultra-Plenary" Grant of Power to Abrogate State Sovereignty

The second possible basis for distinguishing Congress' Fourteenth Amendment power from its Article I powers recognizes that state sovereignty—rather than the Eleventh Amendment—limits Congress' ability to create a cause of action for money damages enforceable against an unconsenting state in federal court. This approach seeks to distinguish the Fourteenth Amendment on the grounds that the constitutional grant of power to Congress to displace state authority is greater under the Fourteenth Amendment than under Article I.

We first consider the limitation that state sovereignty places on Congress to create a cause of action for money damages enforceable against a state. We conclude that Congress may only create such a cause of action when it acts pursuant to a plenary grant of power. However, because both Article I and the Fourteenth Amendment are plenary grants of power, it is not possible to distinguish between the two on this basis. We next consider the limitation that state sovereignty places on the ability of Congress to empower the federal courts to issue an

enforceable order in such a suit. We conclude that state sovereignty does not limit the Article III power of the federal courts. Therefore, it is not possible to distinguish the Fourteenth Amendment on the basis that it provides a unique grant of power to displace a limitation that state sovereignty places on Article III.

a. THE LIMITATION IMPOSED BY STATE SOVEREIGNTY. The Eleventh Amendment has often been "used as a shorthand for the principle that a state may not be sued by either its citizens or citizens of another state." *Connecticut Performing Arts Foundation v. Brown*, 47 B.R. 911, 915 (D. Conn. 1985). However, the Supreme Court has observed that the actual reason a state may not generally be brought into federal court against its will is that "states of the union still possess[ ] attributes of sovereignty . . . save where there has been 'a surrender of the immunity in the plan of the [constitutional] convention.' " *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322-23 (1933) (quoting *The Federalist, No. 81* (A. Hamilton)) (footnote omitted). As sovereigns, states are entitled to the presumption of immunity. However, because the states have delegated some of their sovereign powers to the national government, this immunity is not absolute. Nonetheless, because the states have not delegated all of their sovereign powers, the power of Congress to displace the states' presumptive immunity by creating a cause of action against them is not unlimited.

State sovereignty may limit the power of Congress to create a cause of action for money damages enforceable against an unconsenting state in federal court in either of two ways. First, state sovereignty may limit the Article I power of Congress to impose a monetary obligation on an unconsenting state by creating a cause of action against it for money damages. Second, state sovereignty may limit the Article III power of the federal courts to issue an enforceable order requiring a state to pay a damage award in such a suit. In either case, the Fourteenth Amendment could be distinguished if it granted Congress or the federal courts more power to displace

state sovereignty than they possess in cases in which Congress creates causes of action under its Article I powers.

b. STATE SOVEREIGNTY AND CONGRESSIONAL POWER. State sovereignty limits the power of Congress to create a cause of action against a state. The Tenth Amendment makes clear that if the states have not delegated plenary power to Congress in a given area, Congress may not impose obligations—including the obligation to spend public funds—on the states. In effect, when Congress creates a cause of action for money damages enforceable against a state, it is imposing an obligation (or at least a potential obligation) on the states to expend public funds. *See* Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 Colum. L. Rev. 1413, 1441 (1975). Therefore, if the states have not delegated plenary power to regulate a given area, state sovereignty bars Congress from creating a cause of action against a state in that area.

In contrast to the situation in which Congress lacks plenary power, when Congress acts in the exercise of one of its delegated plenary powers, state sovereignty generally imposes no limits on Congress' ability to impose obligations on the states. In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), the Supreme Court considered the ability of Congress, acting under the plenary grant of power in the Commerce Clause, U.S. Const. Art. I § 8, Cl. 3, to impose a monetary obligation on a state by requiring it to pay overtime wages to some public workers. Although the imposition is less direct when Congress creates a cause of action enforceable against a state, the underlying issue—the limitation that state sovereignty imposes on congressional power—is identical.

The *Garcia* Court held that the test of congressional power to impose financial burdens on a state is simply whether the Constitution has "divested [the states] of their original powers and transferred those powers to the Federal Government." *Garcia*, 467 U.S. at 549. If Congress has the power, the Court held, state sovereignty

imposes no limit on Congress' ability to exercise it. As the Court explained, "the Constitution does not carve out express elements of state sovereignty that Congress may not employ its delegated powers to displace." *Id.* at 550.

Just as state sovereignty does not preclude Congress, acting under its plenary powers, from imposing a monetary obligation directly on a state, state sovereignty does not prevent Congress, when acting under its plenary powers, from imposing a monetary burden on a state by creating a cause of action enforceable against it. This was made clear in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), in which the Supreme Court concluded that the plenary grant of power in the Fourteenth Amendment empowered Congress, in enacting Title VII, to create a cause of action enforceable against a state.

Like the Fourteenth Amendment, Article I is a plenary grant of power. Therefore, because Congress may impose the burden of potential money damages on the states when it acts under its Fourteenth Amendment power, it should also be able to do so under its Article I powers. Nonetheless, language in the *Fitzpatrick* opinion suggests a possible basis for distinguishing Congress' Fourteenth Amendment power. In *Fitzpatrick*, the Court observed that Congress, in acting under § 5 of the Fourteenth Amendment, was "exercising legislative authority that is plenary within the terms of the constitutional grant . . . under one section of a constitutional amendment whose other sections by their own terms embody limitations on state authority." *Fitzpatrick*, 427 U.S. at 456. The language in *Fitzpatrick* could be read to suggest that each grant of power contained in the Constitution must be linked to a provision that, "by [its] own terms," *id.*, limits state authority in order for Congress, acting under that power, to create a cause of action for money damages against a state. If this is so, then when Congress acts under its Article I powers, which are not expressly yoked to limitations on state authority, it cannot create a cause of action for money damages against an unconsenting state.

The lack of an express limit on state authority in Article I does not provide an adequate basis for limiting Congress' power to create a cause of action for money damages against a state to actions taken by Congress under the Fourteenth Amendment. Both Article I and the Fourteenth Amendment are plenary grants of power to Congress. By definition, any grant of power to Congress that is "plenary" is, *ipso facto*, a "limitation[ ] on state authority." *Fitzpatrick*, 427 U.S. at 456. If the states have delegated plenary power to Congress then Congress may "exercise it, although it should interfere with the laws, or even the Constitution of the States." 2 Annals of Cong. 1897 (1791) (*quoting* J. Madison). There is nothing talismanic about the appearance of the word "state" on the face of the Constitution; its appearance in the Fourteenth Amendment does not make that power "more plenary" than Congress' plenary Article I power. There is, therefore, no basis to conclude that the plenary power of the Fourteenth Amendment grants Congress any more power to bring an unconsenting state into federal court than does the plenary power of Article I.[4] Consequently, Congress' Fourteenth Amendment power may not be distinguished from its Article I powers on this basis.

c. STATE SOVEREIGNTY AND FEDERAL JUDICIAL POWER. Even if Congress may create a cause of action against a state under its Article I powers, if state sovereignty limits the Article III power of the federal courts to issue

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[4] *City of Rome v. United States*, 446 U.S. 156 (1980), is not to the contrary. In that case, the Court upheld Congress' use of its Fifteenth Amendment power to enact the Voting Rights Act which limited state sovereign control over voting. The Court observed that the Civil War Amendments "were specifically designed as an expansion of federal power and an intrusion on state sovereignty." *Id.* at 179. However, the Court carefully avoided saying that Congress' power under these Amendments was "more plenary" than under Congress' Article I powers. The Court merely observed that, when Congress acts under other powers "principles of federalism . . . *might* . . . be an obstacle to congressional authority." *Id.* (emphasis added).

an enforceable order requiring a state to pay money damages, then Congress may not make the cause of action enforceable in a federal court.[5] However, we do not believe that state sovereignty limits Article III. We therefore conclude that in those areas in which Congress may create a cause of action for money damages enforceable against a state, state sovereignty does not bar a federal court from enforcing it.

The Supreme Court has often employed language that suggests that state sovereignty imposes a limit on the Article III power of the federal courts. *See, e.g., Pennhurst*, 465 U.S. at 907. Despite such broad language, however, the Supreme Court's decisions not to assert federal judicial authority over the states appear to be based on principles of comity. Although such abstention is often highly desirable in a federal system, it does not appear to be constitutionally mandated. Therefore, when Congress acts under its plenary powers, it may authorize the federal courts to enter money judgments against the states.

The Supreme Court has considered the relationship between sovereignty and judicial power in cases in which one sovereign seeks to assert judicial jurisdiction over a

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[5] In that case Congress would have to provide that the cause of action could be brought in the state courts. Prior Supreme Court cases suggest that a state court is obligated to entertain suits seeking to enforce substantive rights created under federal law. *See, e.g., Testa v. Katt*, 330 U.S. 386 (1947). In at least one case the Court has held that a state may not avoid this obligation by claiming that its courts lack jurisdiction over state officials because of sovereign immunity. *See General Oil v. Crain*, 209 U.S. 220 (1908). *See generally* Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 Stan. L. Rev. 1033, 1093-99 (1983) (discussing the possibility, and the limitations, of resolving federal claims against states in state courts). However, requiring Congress to make bankruptcy suits against a state enforceable in state court would force Congress to discard its long-standing policy of vesting exclusive jurisdiction in bankruptcy cases in the federal courts.

coequal sovereign. In *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), the Court made clear that the sovereignty of a foreign nation, in that case France, was not a limitation on the judicial power of the United States. *Id.* at 136. "The jurisdiction of the nation," the Court explained, "is susceptible of no limitation, not imposed by itself." *Id.* The reason that France, a sovereign nation, was immune to suit in the federal courts was that the courts, in the interest of comity, chose to abstain from asserting jurisdiction. Similarly, in *Nevada v. Hall*, 440 U.S. 410 (1979), the Court made clear that the sovereignty of one state, Nevada, was not a limitation on the judicial power of another state, California. Rather, "Nevada's claim of immunity from suit in California's courts [was] to be answered by reference to the law of California." *Id.* at 417. If Nevada was immune to suit in the courts of California, the Supreme Court explained, it was either because of "an agreement between . . . the two sovereigns, or . . . a voluntary decision of the second to respect the dignity of the first as a matter of comity." *Id.* at 416. If sovereignty is not a limitation on judicial power when one sovereign seeks to assert its judicial power over a coequal sovereign then, *a fortiori*, sovereignty should be no limit on judicial power when a superior sovereign—the federal government—seeks to assert its judicial power over an inferior sovereign—a state.

Supreme Court cases demonstrate that Article III allows a federal court to issue an enforceable order that directly effects a sovereign state. A federal court may enjoin a state from violating the federal constitutional rights of its citizens. *Ex parte Young*, 209 U.S. 160 (1908). A federal court may also enjoin a state in cases in which the state's officers have acted without any state authority. *Florida Department of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982); *Larson v. Domestic & Foreign Commerce Corporation*, 337 U.S. 682 (1949). The only requirement is that these suits must be styled as actions against state officers. These cases rely on the admitted fiction that the court order is against the state officer, not against

the state. However, because "an American state can only act through its officials," *Pennhurst*, 465 U.S. at 114 n.25 (1984), the orders in such cases are undeniably against the state.

The Supreme Court has not permitted the federal courts to enjoin all unlawful state activity. In *Pennhurst*, the Court held that a federal court may not issue an injunction against a state whose officers have acted in violation of state law. This decision does not appear to reflect a limitation on Article III. The Court conceded that there was no "principled basis," *Pennhurst*, 465 U.S. at 114 n.25, for distinguishing between permissible suits against a state, like *Larson* and *Treasure Salvors*, in cases in which the state's officers acted with *no* state authority, and impermissible suits against a state, like *Pennhurst*, in cases where the state's officers had acted *in violation of* state authority. The Court justified its distinction by the need to draw the line somewhere in order to protect state sovereignty. *Id.* However, if state sovereignty imposed a constitutional limit, *all* suits against states—including suits to enjoin federal constitutional violations—would have to be barred. The fact that the Court was able to impose an admittedly arbitrary distinction strongly suggests that principles of comity, rather than strict constitutional restraints, underlie the decisions of the Supreme Court not to assert federal jurisdiction against the states in certain circumstances.

The relatively recent decisions of the Supreme Court limiting relief in "state officer" suits like *Ex parte Young* or *Larson* to prospective relief, *see, e.g., Edelman v. Jordan*, 415 U.S. 651 (1974), also reflect a pragmatic effort at line-drawing rather than a limitation on Article III. If state sovereignty limited the constitutional ability of a federal court to issue an order imposing money damages on the states, then a federal court could never impose such damages on a state. Yet, the Supreme Court has never doubted that "if a state waives its immunity and consents to suit in federal court," *Atascadero*, 105 S.Ct. at 3145, the court may award money damages against it.

See Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part I*, 126 U. Pa. L. Rev. 515, 524-25 (1975).

The fact that Article III allows a federal court to issue orders that have a direct effect on the treasuries of unconsenting states is vividly demonstrated in the bankruptcy area. The Supreme Court has long held that a judicial decree of a federal bankruptcy court can affect the financial interests of an unconsenting state government. Thus, in *Gardner v. New Jersey*, 329 U.S. 565, 578 (1947), the Court held that a bankruptcy court could void a tax lien held by a state. *See also Van Huffel v. Harkelrode*, 284 U.S. 225 (1931) (same). A tax lien, like a claim for the proceeds of its bank accounts, is an asset of a state treasury. Voiding a lien is little different from ordering the state treasurer to pay over a portion of the contents of the state's bank account. If Article III allows a court to take the former action, it must certainly allow the latter.

The fact that, when Congress acts under the Fourteenth Amendment, it may require the federal courts to impose monetary damages on a state, *Fitzpatrick*, 427 U.S. 445, further convinces us that there is no constitutional limit on the ability of a federal court to impose money damages on a state. The Fourteenth Amendment makes no reference to the judicial power of the United States. There is no basis to conclude that the Fourteenth Amendment's express grant of power to Congress also contained an implicit grant of power to the federal courts. Therefore, if state sovereignty limited Article III, a federal court could not hear a suit against a state for money damages even if the cause of action was created under Congress' Fourteenth Amendment power. That, however, is not the case.

We therefore conclude that state sovereignty does not limit the Article III power of a federal court to order a state to pay money damages. Consequently, there is no limitation on federal judicial power for the Fourteenth Amendment to displace. As a result, it is not possible to distinguish Congress' Fourteenth Amendment power from

its Article I powers by arguing that Congress may displace the limitation that state sovereignty places on federal judicial power more completely when it acts under its Fourteenth Amendment power. Rather, we must conclude that because Congress can make a cause of action for money damages against a state enforceable in the federal courts when Congress acts under its Fourteenth Amendment power, it can do so under any plenary power.

In light of the above, we conclude that this court was correct in *Jennings*: the Fourteenth Amendment is not the only constitutional provision under which Congress may require a state to submit to federal jurisdiction. Congress may abrogate state immunity to suit pursuant to any of its plenary powers.

C.

In enacting § 547(b) of the Bankruptcy Code, 11 U.S.C. § 547 (1982), Congress was plainly exercising its power "t[o] establish . . . uniform laws on the subject of Bankruptcies," U.S. Const. Art. 1 § 8, Cl. 4. When Congress acts pursuant to the Bankruptcy Clause, it is exercising a plenary power. *See International Shoe Co. v. Pinkus*, 278 U.S. 261, 265 (1929) ("The power of Congress to establish uniform laws on the subject of bankruptcies throughout the United States is unrestricted and paramount. . . . States may not . . . interfere. . . ."). Therefore, in enacting § 547(b) Congress had the power to create a cause of action for money damages enforceable against an unconsenting state in federal court. The question then becomes whether, in enacting this provision, Congress intended to use its constitutional power.

III

A.

Normally, in interpreting a statute, we look to the face of the statute and to the accompanying legislative history. We then determine, in light of this evidence, what we

believe Congress intended. *See, e.g., Larimore v. Comptroller of the Currency*, 789 F.2d 1244 (7th Cir. 1986) (en banc). However, the Illinois Secretary of State, the defendant-appellee in this action, argues that the Supreme Court's decision in *Atascadero State Hospital v. Scanlon*, 105 S.Ct. 3142 (1985), demands that we take a different approach in cases involving congressional creation of a cause of action against a state.

In *Atascadero*, the Supreme Court held that § 504 of the Rehabilitation Act, 29 U.S.C. § 504 (1982), which bars employment discrimination by federal fund recipients against the disabled, did not create a cause of action for money damages by an individual who claimed that a state that was receiving federal funds had discriminated against him on the basis of his physical disability. The Court, noting that the statute only provided for suits against "any recipient" of federal funds, held that this was insufficient to enable the court to be "certain" that Congress had intended to create a cause of action against a state. *Atascadero*, 105 S.Ct. at 3147-49. The Court explained that because Congress had not provided for suits against states "in the statutory language," it could not be "certain" of congressional intent. *Id.* at 3148. The Court did not discuss the legislative history of the Rehabilitation Act.

The Secretary contends that, under *Atascadero*, we can only find that Congress created a cause of action against a state if the statute, on its face, expressly provides for suits against a state. If the face of the statute can be read in any other conceivable manner, the Secretary insists that we must hold that it does not allow for a suit against a state. Moreover, we are told by the Secretary that we are precluded, under *Atascadero*, from seeking guidance as to congressional intent in the pages of the legislative history. We cannot accept this view.

The Supreme Court has stated repeatedly that the federal courts must employ a somewhat higher standard of proof than is usual in cases of statutory interpretation in cases in which we assess whether Congress intended to

create a cause of action enforceable against a state. The Court has used various formulations to describe this heightened scrutiny. At a minimum, it is clear that "a general authorization for suit in federal court is not . . . sufficient" to create a cause of action for money damages enforceable against a state in federal court. *Atascadero State Hospital v. Scanlon*, 105 S.Ct. 3142, 3149 (1985). Rather, there must be "an unequivocal expression of congressional intent." *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99 (1984). The Court has recently stated that Congress must "express its intention . . . in the statute itself." *Atascadero*, 105 S.Ct. at 3148. However, the Court has not, in practice, always required Congress to do so. *See Hutto v. Finney*, 437 U.S. 678 (1978) (Civil Rights Attorney's Fees Award Act held to permit award of fees against states). Indeed, in its most recent opinion on the subject, the Court may have retreated from this view. *See Green v. Mansour*, 106 S.Ct. 423, 425-6 (1985) (no "face of the statute" requirement specified).

The precise test to be used to determine whether Congress has created a cause of action against a state thus remains unclear. However, we believe that the Court captured the essence of the test in one sentence of the *Atascadero* opinion: "it is incumbent upon the federal courts to be *certain* of Congress' intent." *Atascadero*, 105 S.Ct. at 3148 (emphasis added). Therefore, in seeking to determine whether Congress created a cause of action against a state, we will follow our usual procedure and look first to the face of the statute. If the words of the statute make no reference to a suit against a state, it is highly unlikely that we can be "certain" that Congress intended to create such a cause of action. However, especially where the statute expressly provides for a suit against a state, we will not hesitate to consult the legislative history to resolve any lingering uncertainty. *See Gomez v. Illinois Board of Education*, No. 85-2915, slip op. at 9-10 (7th Cir. Jan. 30, 1987); cf. *Cannon v. University of Chicago*, 441 U.S. 677, 717 (1979) (In determining the existence of a private right of action, a court should seek to

give effect to congressional intent. However, "[w]hen Congress intends private litigants to have a cause of action . . . the far better course is for it to specify as much. . . .").

The requirement of "certainty" has important constitutional underpinnings. The Supreme Court has explained that members of Congress play a paramount role in protecting the interests of the states from federal encroachment. *See Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 550-554 (1985). The requirement that we be "certain" of Congress' intent is designed to prevent us from casually attributing to Congress the intention of imposing on the states the burden of potential liability in suits for money damages.[6] This insures that we will not upset "the fundamental constitutional balance between the Federal Government and the States." *Atascadero*, 105 U.S. at 3145-46. At the same time, however, we must remember that our goal here, as in any effort at statutory interpretation, is "to construe the language [of the statute] so as to give effect to the intention of Congress." *United States v. American Trucking*, 310 U.S. 534, 542 (1940). For if a court "thinking to maintain the 'fundamental constitutional balance between the Federal Government and the States' fails to implement the plain intent of Congress, it upsets another fundamental constitutional balance: the balance between the legislature and the judiciary." Note, *Congressional Abrogation of State Sovereign Immunity*, 86 Colum. L. Rev. 1436, 1448 (1986). *See generally* Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States*, 126 U. Pa. L. Rev. 1203, 1272-1277 (1978) (The Supreme Court's interpretive rules would

[6] Although "[t]he governmental immunity doctrine has its origin in the English common law and was based on the premise that the King could do no wrong," *Adams v. Harris County*, 316 F. Supp. 938, 943 (S.D. Tex. 1970), we have previously recognized that, in modern times, "[t]he purpose of sovereign immunity is to protect the public fisc . . . ," *Parks v. Pavkovic*, 753 F.2d 1397, 1407 (7th Cir. 1985).

be constitutionally unacceptable if interpreted "to prevent the judiciary from finding causes of action against the states in situations where all the circumstances suggest that such causes of action are within the statutory purpose.").

The Supreme Court has never failed to give effect to the clear intent of Congress to create a cause of action against a state. Whenever the Court has held that a state may not be sued for money damages in a federal court, it has been because the Justices could not be "certain" that Congress intended to subject the state to suit. Thus, in *Employees of the Department of Public Health and Welfare v. Missouri*, 411 U.S. 279 (1973), the Court concluded that the Fair Labor Standards Act did not create a cause of action against a state because the statute did no more than provide for suit against "any employer," *id.* at 283, and because the Court "found not a word in the [legislative] history . . . [that Congress intended] to make it possible for . . . citizen[s] . . . to sue the State in the federal court," *id.* at 285. Similarly, the Court's conclusion in *Edelman v. Jordan*, 415 U.S. 651 (1974), that § 1983 did not create a cause of action for money damages against a state was based on the fact the legislative history was "silen[t]" as to the possibility that Congress intended to allow such suits. *See Quern v. Jordan*, 440 U.S. 332, 342-43 (1979).

The Court was also guided by congressional intent in *Hutto v. Finney*, 437 U.S. 678 (1978). In that case, the Court rejected the state's argument that, although Congress had intended to provide for an award of attorneys' fees by prevailing parties in civil rights suits against the states, it had "botched the job" by not using express language on the face of the statute. *See* 46 U.S.L.W. 3535-36 (1978) (describing oral argument). The Court found that "[t]he legislative history [was] . . . plain. . . . '[Congress] intended that attorney's fees [would] be collected . . . from the state. . . .'" *Hutto v. Finney*, 437 U.S. at 694 (*quoting* S. Rep. No. 94-1101 at 5 (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 5908, 5913). Accordingly, the Court gave effect to the legislative purpose.

The decision of the Supreme Court in *Atascadero* is fully consistent with its prior opinions. In determining that § 504 of the Rehabilitation Act did not create a cause of action against a state, the Court observed that the statute provided only a general authorization for suit against any federal fund recipient. *Atascadero*, 105 S.Ct. at 3149. Although the Court did not discuss the legislative history, there was little need to do so. Proponents of the position that Congress had intended to create a cause of action against the states were not able to cite any legislative history demonstrating that Congress had specifically considered the issue and intended to allow such suits. *See id.* at 3151-53 (Brennan, J., dissenting). As a result, there was simply no way that the Court could be "certain" that Congress had intended to create such a cause of action.

In light of the above, we conclude that if the words of the statute and the legislative history, taken together, are sufficient to make us "certain" that Congress intended to create a cause of action against a state, we are duty-bound to give effect to that desire.

B.

In the present case, our inquiry begins with the clear language of the statute. Section 547(b) provides that a debtor in possession may bring suit in federal court to "avoid any transfer of an interest in property . . . to or for the benefit of a creditor." 11 U.S.C. § 547(b) (1982 & 1985 Supp.).[7] Section 106(c) of the Code, 11 U.S.C. § 106(c) (1982), makes unmistakeably clear that "a provision of [the Bankruptcy Code] that contains 'creditor' . . . applies to governmental units and . . . a determination by the court of an issue arising under such a provision binds governmental units." *Id.* Section 101(21) of the Code, 11 U.S.C. § 101(21) (1982), further defines a "governmental unit" to include a "State." *Id.*

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[7] Actually § 547 grants this power to a trustee. However, § 522(h), 11 U.S.C. § 522(h) (1982), gives a debtor in possession the same power as a trustee.

The Secretary of State correctly observes that § 547(b) does not itself use the word "State." However, in seeking to construe a statute, we do not view any provision in isolation. Rather, we seek to understand a given provision by determining how it fits into the larger statute of which it is a part. *See, e.g., Water Quality Ass'n v. United States*, 795 F.2d 1303, 1306-08 (7th Cir. 1986). The Supreme Court has only recently reminded us of the importance of taking such an integrated view when interpreting the Bankruptcy Code. *See Kelly v. Robinson*, 107 S.Ct. 353, 358 (1986). We see no reason to depart from that approach in this case. There is no reason to conclude that Congress' decision to employ general definitions in § 101(21) and § 106(c), and to make these definitions applicable to numerous specific provisions, including § 547(b), renders the statute constitutionally inadequate. On the contrary, the express language of the statute, standing alone, is sufficient to make us "certain" that Congress intended to create a cause of action against a state.

Notwithstanding the clear statutory language, the Secretary of State suggests two possible constructions of § 106(c) that could, conceivably, be read to mean that that section, and therefore § 547(b) which it defines, was not intended to provide for suits against a state. Both contentions are easily dismissed.

The Secretary first contends that the general sovereign immunity provision, § 106(c), seeks only to create causes of action against the federal government in those provisions using the word "creditor." This view is difficult to support. Section 106(c) provides that a provision of the Bankruptcy Code that contains the word " 'creditor' . . . applies to governmental units." If Congress intended to limit coverage to the federal sovereign it would presumably have used the singular form. Furthermore, it is difficult to see why Congress would define "governmental unit" to include states in § 104(21), but then use the plural of that term to refer only to the federal government in § 106(c).

The Secretary of State correctly observes that several of the bankruptcy courts that have considered this ques-

tion have concluded that § 106(c) applies only to the federal government. *See, e.g., Cohen v. Illinois Dept. of Public Aid* (*In Re Ramos*), 12 B.R. 250 (Bankr. N.D. Ill. 1981). The Secretary contends that the divergence of opinion among the bankruptcy courts as to whether § 106(c) applies to states is, itself, enough to preclude us from ever being "certain" of Congress' intent. We do not agree. The existence of divergent opinions among other courts does not preclude this court from being "certain" of Congress' intent. The better reasoned cases argue convincingly that § 106(c) applies to the states. *See, e.g., Matter of Willington Convalescent Home*, 39 B.R. 781 (Bankr. D. Conn. 1984).

The Secretary also suggests that if we read § 106(c) to create a cause of action against a state in provisions using the term "creditor," we will render § 106(a) and § 106(b), which allow for suit against a state that has brought a claim against a debtor, superfluous.[8] The Secretary argues that if § 106(c) makes states generally amenable to suit, Congress would have had no reason to provide that states were amenable under the more limited circumstances of § 106(a) and § 106(b). A prior case in this circuit forecloses this argument. In *Matter of Neavear*, 674 F.2d 1201, 1204 (7th Cir. 1982) we made clear that § 106(a) and § 106(b) concern cases in which a state, by filing a proof of claim, consents to have claims adjudicated by the bankruptcy court. In contrast, § 106(c) refers to cases, like the pres-

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[8] These provisions provide that:

> (a) A governmental unit is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which such governmental unit's claim arose.
>
> (b) There shall be offset against an allowed claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.

11 U.S.C. §§ 106(a), (b) (1982).

ent one, in which Congress seeks to create a cause of action against an unconsenting state.[9]

In light of the clear statutory language, we need not rely on the legislative history. However, if we had any lingering doubt—which we do not—the legislative history would put it to rest. An explanatory statement, read to both houses during debate, establishes that § 106(c) was intended, *inter alia*, to make clear that § 547(b) "permits a . . . debtor in possession to assert avoiding powers under Title 11 against a governmental unit." 124 Cong. Rec. 32,394 (Rep. Edwards) (1978); *id.* at 33,993 (Sen. DeConcini) (1978). *See generally Matter of Willington Convalescent Home*, 39 B.R. 781, 786-88 (Bankr. D. Conn. 1984) (providing a detailed description of the legislative history of § 106(c)). We will not distort our obligation to be "certain" of Congress' intent into an invitation to thwart Congress' will.

In light of the express statutory language and the indisputable evidence contained in the legislative history, we are "certain" that in enacting § 547(b), as defined by § 101(21) and § 106(c), Congress intended to create a cause of action for money damages enforceable against a state in federal court.

III

We are aware that the result that we have reached may appear to be at odds with the expansive language that the Supreme Court has often employed in discussing the Eleventh Amendment and sovereign immunity. However, we believe that if faced with the question that is before us, the Supreme Court would reach the same result that we do. To hold that the Eleventh Amendment wiped out all congressional power then existing to make states

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[9] This difference is often conceptualized as the difference between state voluntary "waiver" of immunity and congressional "abrogation" or "forced waiver" of immunity.

amenable to suit in federal court—even though the words of the amendment cannot support such an interpretation and the history of the amendment refutes it—would be an extraordinary step which we doubt the Court would take. To hold that, absent constitutional amendment, federal supremacy must always give way to state sovereign immunity would be equally remarkable.

If we were to conclude that Congress may not create a cause of action for money damages enforceable against a state in federal court, we would be obligated to overrule our decision in *Jennings* and create a split among the circuits. We would also have no choice but to hold that § 547(b) is unconstitutional. Were we to do so, this would severely impair Congress' plenary power to regulate bankruptcies. If the federal courts were not able to order a state to turn over assets to a bankruptcy estate, then any state owed money by a debtor having financial problems would have a strong incentive to collect whatever funds it believed to be due as rapidly as possible—even if this pushed the debtor into insolvency—rather than risking the possibility of recovering only a portion of their debt in any subsequent bankruptcy proceedings. In effect, we would be holding that the Constitution makes a state a preferred creditor in every bankruptcy. The very existence of this power would doubtless encourage other creditors to accelerate their collections. The end result would be an increase in bankruptcies and a distortion of the system of preferences that Congress has carefully crafted. We seriously doubt that either the Eleventh Amendment or the doctrine of sovereign immunity demands such a fundamental disruption of the bankruptcy system. Given such doubt, we decline to hold § 547(b) unconstitutional.

The decision of the district court is therefore REVERSED and the case is REMANDED to the bankruptcy court for proceedings consistent with this opinion.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

February 13, 1987.

Before

Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*
Hon. WILLIAM J. CAMPBELL, *Senior District Judge**

No. 86-1216

IN THE MATTER OF:
MCVEY TRUCKING, INC.,

Debtor-Appellant.

Appeal from the United States District Court
for the Central District of Illinois, Danville Division.
No. 85 C 2391—**Harold A. Baker**, *Judge.*

This cause was heard on the record from the United States District Court for the Central District of Illinois, Danville Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, and the cause is REMANDED, in accordance with the opinion of this Court filed this date.

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* The Honorable William J. Campbell, Senior District Judge for the Northern District of Illinois, Eastern Division, is sitting by designation.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

JUDGMENT IN A CIVIL CASE

McVey Trucking
v.
Secretary of State of Illinois et al.

Case Number: 85-2391

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

the order of the Bankruptcy Court of dismissing the complaint is affirmed.

Date 1/10/86

Clerk John M. Waters

/s/ Sheryl L. Tolen
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

No. 85-2391

McVey Trucking, Inc.,

Plaintiff,

vs.

Secretary of State of Illinois, First National Bank of Danville, and First Midwest Bank of Danville,

Defendants.

MEMORANDUM OPINION AND ORDER ON APPEAL

On September 4, 1985, the Bankruptcy Court made final an order dismissing the plaintiff's complaint against the Secretary of State of Illinois to compel the turnover of property of the bankrupt estate delivered to the State of Illinois by the defendants, First National Bank of Danville and First Midwest Bank of Danville. The question on appeal is whether section 106(c) and section 547 of the Bankruptcy Code, 11 U.S.C. § 106(c) and 11 U.S.C. § 547, waive the Eleventh Amendment immunity of the State of Illinois. The court holds that those statutory provisions do not waive Illinois' immunity, and the order of the Bankruptcy Court is affirmed.

The facts are straight forward and are not contested. On February 27, 1984, McVey Trucking, Inc., sent to the Secretary of State of the State of Illinois a one-half installment in the amount of $20,188.25 on the flat weight tax. At the same time, McVey Trucking placed with the First National Bank of Danville a certificate of deposit

in the sum of $20,188.25 representing the remaining one-half installment on the highway use tax. McVey Trucking also placed with the First Midwest Bank of Danville the sum of $2,490 in a certificate of deposit for future purchases and flat weight tax for the Secretary of State. On April 1, 1984, the First National Bank of Danville closed the operation of McVey Trucking, Inc. On May 16, 1984, McVey Trucking was placed in involuntary bankruptcy under Chapter 11 of the Bankruptcy Code.

During the pendency of the bankruptcy proceedings, on July 9, 1984, the Secretary of State requested payment from the First National Bank of Danville of the $20,188.25 representing the remaining one-half installment on the highway use tax. The First National Bank of Danville, with knowledge of the pending bankruptcy proceedings and the stay entered by the Bankruptcy Court, sent a cashier's check to the Secretary of State for the second half of the highway tax. Subsequently, on April 29, 1985, the First Midwest Bank of Danville sent the Secretary of State, at his request, the $2,490 held by First Midwest on behalf of McVey Trucking. The total payments to the Secretary of State were $22,678.25. By its action, the plaintiff, McVey Trucking, seeks to recover the payments made to the Secretary of State under the provisions of 11 U.S.C. § 547. The plaintiff contends that Congress has abrogated Illinois sovereign immunity under the provisions of 11 U.S.C. § 106(c) and under § 547.[1] The Secretary of State of Illinois contends in opposition that the Eleventh Amendment to the United States Constitution bars this suit against the State of Illinois. The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State whereby citizens or subjects of any foreign state.

This amendment protects the traditional concept of a State's sovereign immunity in the federal system. *See Pennhurst State School and Hospital v. Halderman*, 465

U.S. 89, 99 (1984). Athough not clearly expressed in the language of the amendment, the Supreme Court has held that the amendment bars a citizen from bringing a suit in federal court against the citizen's own state. *Hans v. Louisiana*, 134 U.S. 1 (1890). It does not bar a citizen from bringing suit in state court.

The Supreme Court recently discussed Congressional abrogation of the Eleventh Amendment immunity in *Atascedero State Hospital v. Scanlon*, ___ U.S. ___, 53 U.S.L.W. 4985 (June 28, 1985). In *Atascedero* the Court ruled in a five-four decision that a federal statute relating to the funding of employment positions for the handicapped did not abrogate California's Eleventh Amendment immunity to suit in federal court. Speaking of Congress' power to override the Eleventh Amendment, the Court said: "We . . . affirm that Congress may abrogate the State's constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." 53 U.S.L.W. at 4987. Certainly there is nothing in the language of section 106 or section 547 of the Bankruptcy Code which would indicate satisfaction of the *Atascedero* demand, "that Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself." *Id.* at 4988.

It should be noted that this is a suit *against* Illinois in federal court attempting to recover funds from the State's general fund. This is not a case of the State seeking to enforce a claim against a bankrupt's estate and having a set off made by the bankrupt estate against the State's claim. Clearly, that sort of procedure would be allowed and immunity would be waived under section 106.

The Supreme Court has recognized two exceptions to the general prohibition of citizens' suits against a state. First, a state may consent to suit in federal court, thereby waiving its immunity. *See e.g., Clark v. Barnard*, 108 U.S. 436, 477 (1883). Second, Congress may abrogate a state's Eleventh Amendment immunity by legislation pursuant

to one of Congress' plenary powers under the United States Constitution. *See Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (Fourteenth Amendment); *Parden v. Terminal Railway of Alabama*, 377 U.S. 184 (1964) (Commerce Clause). *See also Jennings v. Illinois Office of Education*, 589 F.2d 935 (7th Cir.), *cert. denied*, 441 U.S. 967 (1979) (war powers). Before a court will recognize the abrogation of state immunity, however, Congress must show with an "unequivocal expression" that it intended to override traditional immunity of the state from damage claims.

The holding of *Atascedero* and the fact that this is a suit in federal court against a state to recover from the general fund of the state clearly indicates that the suit is barred by the Eleventh Amendment. The plaintiff, if it chooses, may bring suit against the State in the State's court and seek to impose the restrictions of the Bankruptcy Code in that forum.

The order of the Bankruptcy Court of dismissing the complaint is affirmed.

ENTER this 10th day of January, 1986.

/s/ Harold A. Baker
Chief U.S. District Judge

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[1] 11 U.S.C. § 106:

(a) A governmental unit is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which such governmental unit's claim arose.

(b) There shall be offset against an allowed claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.

(c) Except as provided in subsections (a) and (b) of this section and notwithstanding any assertion of sovereign immunity—

(1) a provision of this title that contains "creditor," "entity," or "governmental unit" applies to governmental units; and

(2) a determination by the court of an issue arising under such a provision binds governmental units.

11 U.S.C. § 547:

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of property of the debtor—

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was solvent;

(4) made—

(A) on or within 90 days before the date of the filing of the petition; or

. . . .

(5) that enables such creditor to receive more than such creditor would receive if:

. . . .

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

[Filed 9-4-85]

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF ILLINOIS

Bankruptcy No. 284-00373
Adversary No. 284-0187

McVey Trucking, Inc.,

Debtor.

McVey Trucking, Inc.,

Plaintiff,

vs.

Secretary of State of Illinois and
The First National Bank of Danville,

Defendants.

ORDER

This matter comes before the court on the Motion to Reconsider filed by McVey Trucking, Inc., ("McVey"). McVey asks this court to reconsider its order of April 29, 1985, granting the Secretary of State's Motion to Dismiss.

This case concerns the application of the Sovereign Immunity Doctrine and the application of the Eleventh Amendment. The issue before the court is whether Sec. 106(c) of the Bankruptcy Code waives the sovereign immunity of the Secretary of State of Illinois thereby making the Secretary of State amenable to suit and judgment. Sec. 106 provides:

> (a) A governmental unit is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which such governmental unit's claim arose.
>
> (b) There shall be offset against an allowed claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.
>
> (c) Except as provided in subsections (a) and (b) of this section and notwithstanding any assertion of sovereign immunity—
>
> > (1) a provision of this title that contains "creditor", "entity", or "governmental unit" applies to governmental units; and
> >
> > (2) a determination by the court of an issue arising under such a provision binds governmental units.

McVey argues that Sec. 106(c) excepts this case from the Doctrine of Sovereign Immunity and Eleventh Amendment and allows McVey to file suit against the Secretary of State. The court, however, disagrees. Sec. 101(24) defines "Governmental Unit" as:

> "United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency; or instrumentality of the United States, a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government"

Here, McVey claimed that the Secretary of State waived its sovereign immunity before the Illinois Department of Revenue filed a proof of claim in the McVey Trucking, Inc. bankruptcy on February 8, 1985. Affording Section 101(24) its plain meaning, it appears that the Secretary of State's office and the Illinois Department of Revenue are separate governmental units. Consequently, the court

concludes that the only way the Secretary of State could waive its sovereign immunity would be if *that* office filed a proof of claim in the Debtor's bankruptcy. Therefore, the motion to reconsider the court's order of April 29, 1985 is denied.

IT IS THEREFORE ORDERED that the Motion to Reconsider filed by the Plaintiff, McVey Trucking, Inc., be, and is hereby denied.

ENTERED: September 4, 1985

/s/ Larry Lessen
Bankruptcy Judge

xc: John Greenleaf, Jr.
Timothy Smith
William C. Kurylack

Supreme Court, U.S.
FILED
JUN 15 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1847

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JIM EDGAR,
Secretary of State,
State of Illinois,

Petitioner,

v.

MCVEY TRUCKING, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether Congress may abrogate the Eleventh Amendment pursuant to its Constitutional authority under Article I, §8, cl. 4 of the Constitution of the United States of America?

II. Whether Congress, in §§ 547(b), 106(c) and 101(21) of the Bankruptcy Code, 11 *U.S.C.* §§ 101(21), 106(c) and 547(b), specifically waived the Eleventh Amendment immunity of the State of Illinois?

PARTIES

The petitioner properly stated the parties, except that McVey Trucking, Inc., Respondent, is an Indiana corporation, is not publicly owned, is not the subsidiary of any other corporation, partnership or enterprise, and is not the parent corporation to any subsidiaries.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NO. 86-1847

JIM EDGAR, Secretary of State,
State of Illinois,

Petitioner,

v.

MCVEY TRUCKING, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

McVey Trucking, Inc. Respondent, respectfully submits this Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit requesting that the petition be denied.

OPINIONS BELOW

The petition adequately sets forth the opinions of the lower courts in its Appendix. Reference to the opinions below in this brief shall be to the appropriate page of the Appendix contained in the petition and designated as "App. __".

JURISDICTION

The petition adequately sets forth the jurisdictional grounds of this court.

CONSTITUTION

Article 1, §8, cl. 4 of the *Constitution of the United States* states that Congress shall have the power:

> To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States.

STATUTES

The petition adequately states the pertinent provisions of §§106(c) and 547(b) of the Bankruptcy Code. 11 *U.S.C.* §§106(c) and 547(b).

Section 101(21), of the Bankruptcy Code, 11 *U.S.C.* §101(21) (1982), states:

> 'governmental unit' means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government;

STATEMENT OF THE CASE

The petition adequately sets forth the statement of the case, except wherein the petition implies that the Seventh Circuit was unclear of the test to be applied in this case (Petition, p.5). The Seventh Circuit quite

clearly sets forth the test established by this Court and based its decision thereon utilizing the clear language of the three pertinent sections of the Bankruptcy Code, to-wit: 11 *U.S.C.* §§547(b), 106(c) and 101(21).

REASONS FOR NOT GRANTING THE PETITION

I. ARTICLE I, §8, CL.4 OF THE CONSTITUTION OF THE UNITED STATES GRANTS CONGRESS AUTHORITY TO MAKE A STATE AMENABLE TO SUIT.

The Seventh Circuit considered the issue before the court in a two-step approach. First, it found that Congress has the authority under the Constitution to abrogate State immunity to suit pursuant to its Article I powers. (App. A-22). The Court then found that Congress exercised that authority in the Bankruptcy Code, specifically creating 'a cause of action for money damages enforceable against a state in federal court.' (App. A-30).

Article I, §8, cl.4 of the *Constitution of the United States of America*, provides in pertinent part, that Congress has the authority to establish " . . . uniform laws on the subject of bankruptcies throughout the United States." This Court has long held that Congress has constitutional authority to grant the bankruptcy court power to deal with the monetary interest of an unconsenting state. *Gardner v. New Jersey*, 329 U.S. 565, 578, 91 L.Ed. 504, 517, 67 S.Ct. 467, 474 (1946); *Van Huffel v. Harkelrode*, 284 U.S. 225, 76 L.Ed. 256, 52 S.Ct. 115 (1931).

Also, the courts of appeals of the individual circuits have traditionally applied "plenary powers" to different sections of Article I reflecting constitutional

authority in Congress to abrogate the eleventh amendment immunity of a State. For example, the Seventh Circuit, in the case of *Jennings v. Illinois Office of Education*, 589 F.2d 935 (1979), *cert. denied*, 441 U.S. 967, 60 L.Ed.2d 1073, 99 S.Ct. 2417 (1979), held that Congress properly exercised its legislative authority which is plenary within the terms of the constitutional "war powers" grant, thus making Illinois amenable to a federal damage action.

The Fifth Circuit found that Congress had authority in *Peel v. Florida Dept. of Transportation*, 600 F.2d 1070 (1979) to allow a federal court to enter a money judgment pursuant to Article I, §8, stating at 600 F.2d 1080:

> A more consistent rationale is that a state consents to private damage actions when Congress manifests a sufficient purpose to abrogate a state's immunity. Under this approach, the state waived its immunity from suit in federal court at the same time it surrendered its sovereign immunity and gave Congress the power to legislate under delegated powers. As recognized by Chief Justice Hughes in an early case involving sovereign immunity, "States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a 'surrender of this immunity in the plan of the convention.' " *Monaco v. Mississippi*, 292 U.S. 313, 322-23, 54 S.Ct. 745, 748, 78 L.Ed. 1282 (1934) (quoting the Federalist No. 81 (A. Hamilton)) (footnote omitted). This rationale removes the

> eleventh amendment as a bar whenever Congress validly has exercised its powers.

The Third Circuit relied on *Jennings* and *Peel* when it held in *Gardner v. Commonwealth of Pennsylvania, Department of Public Welfare*, 685 F.2d 106 (1982), *cert. denied*, 490 U.S. 1092, 103 S.Ct. 580 (1982), at page 109, that: "If Congress intends to bind the State by a cause of action arising under federal law, the eleventh amendment is no bar."

In the case at bar, the Seventh Circuit followed firmly established principals of law which enable Congress, pursuant to Constitutional authority, to abrogate State immunity to suit within the Bankruptcy Code. The Seventh Circuit did not expand Congressional authority as argued by the petitioner. The court of appeals made its ruling based upon the established principals of law of this Court, the several circuits, and the Constitution. There is no question for review by this Court with regard to congressional authority to abrogate state immunity.

II. THE COURT OF APPEALS PROPERLY FOUND SPECIFIC AND UNEQUIVOCABLE LANGUAGE WITHIN SECTIONS 547(b), 106(c) AND 101(21) OF THE BANKRUPTCY CODE WHICH ABROGATES STATE IMMUNITY TO SUIT FOR MONEY DAMAGES.

Since the Constitution grants Congress authority to abrogate state immunity to suit, and the right to pass laws on ". . . the subject of bankruptcies . . .", then Congress must specifically state that abrogation within the statute so that the federal courts may be certain of Congress' intent. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 451-452, 49 L.Ed.2d 614, 96 S.Ct. 2666 (1976).

The Seventh Circuit followed this principle of looking at the statute for clear congressional intent to make the States amendable to suit. The court succinctly reasoned that:

> In the present case, our inquiry begins with the clear language of the statute. Section 547(b) provides that a debtor in possession may bring suit in federal court to 'avoid any transfer of an interest in property . . . to or for the benefit of a creditor.' 11 U.S.C. § 547(b) (1982 & 1985 Supp.). Section 106(c) of the Code, 11 U.S.C. § 106(c) (1982), makes unmistakeably clear that 'a provision of [the Bankruptcy Code] that contains "creditor" . . . applies to governmental units and . . . a determination by the court of an issue arising under such a provision binds governmental units.' *Id.* Section 101(21) of the Code, 11 U.S.C. § 101(21) (1982), further defines a 'governmental unit' to include a 'State.' *Id.* (App. A-27). (Footnotes omitted).

The petitioner misinterprets the requirement that the waiver of state immunity be within the statute, arguing that each section of the statute must contain that waiver. This creates ludicrous inefficiencies and redundancies in legislative drafting. In a time in which the Courts, Congress, the public and common sense demands less verbosity, the State argues for an explosion of paper and words. The Seventh Circuit deals with this argument stating:

> The Secretary of State correctly observes that § 547(b) does not itself use the word 'State'. However, in seeking to construe a statute, we do not view any provision

> in isolation. Rather, we seek to understand a given provision by determining how it fits into the larger statute of which it is a part. *See*, e.g., *Water Quality Ass'n v. United States*, 795 F.2d 1303, 1306-08 (7th Cir. 1986). The Supreme Court has only recently reminded us of the importance of taking such an integrated view when interpreting the Bankruptcy Code. *See Kelly v. Robinson*, 107 S.Ct. 353, 358 (1986). We see no reason to depart from that approach in this case. There is no reason to conclude that Congress' decision to employ general definitions in § 101(21) and § 106(c), and to make these definitions applicable to numerous specific provisions, including § 547(b), renders the statute constitutionally inadequate. On the contrary, the express language of the statute, standing alone, is sufficient to make us 'certain' that Congress intended to create a cause of action against a state. (App. A-28).

It is clear that the court of appeals correctly found that Congress specifically and unequivocably annulled the eleventh amendment immunity of the State by enactment of §§ 106(c) and 101(21) of the Bankruptcy Code and in § 547(b) granted a cause of action in federal court for money damages against a state. (App. A-30).

CONCLUSION

Petitioner fails to show any important or special reason for this Court to review the rulings of the Seventh Circuit. Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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